

MONTANA PUBLIC DEFENDER COMMISSION



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December 3, 2009

Randi Hood
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Dear Randi,

While the accuracy of the American University study is yet to be determined, it is apparent to me that, based upon that study and the information obtained in the last few months from a large number of sources, that Public Defender Commission has left a great number of the full-time employees feeling that they have been left out of the process of initiating and managing the system. In response, I intend to send written letters in a follow-up after each Public Defender Commission meeting outlining the PDC's specific concerns and requesting information from or action to be taken by the Office of the Public Defender. I will also attempt to include a report on the PDC's activities to keep you and the OPD informed. I will ask that this and all following letters be posted to the OPD website so that everyone in the system has a feel for what the Commission is doing. For the same reason, I am respectfully requesting that you post OPD's response to each of my letters.

With the foregoing in mind, please provide a written response to my questions and the information requested below. I would appreciate it if, to the extent possible, you could provide that information at least one week prior to our next meeting, which I believe is set on December 18, 2009.

1. An explanation of how the Case Weighting System data has been and is currently being generated.

Since the PDC made this request at our last meeting, I have already received a considerable amount of information and data from OPD. Based on discussions with many people, including highly informative explanations from the central management staff, I am under the impression that case weighting system is a separate system that is not included within the Just Ware program. Instead, it is an Excel spreadsheet. The numbers on the sheet for each region are generated by the regional deputy and managing attorney or someone assigned by those people to perform a task. The caseload information is then reported to central office on a monthly basis shortly after the end of each month. The information contained on the spread sheet for each attorney includes a 12-month summary. If there is no actual information for any given attorney, any month for which there is no actual information will be assigned 11 units. This means that the projected maximum case load for each attorney should not exceed a total of 150 units in any given 12-month span. The labor management committee has defined a Acase@as Aa client in a single transaction. @In most cases the docket number is a case. Petitions to revoke, at least on part on a new crime, are counted as one with a new crime. Lately, reports have been forwarded to the central office Butte by the following individuals:

1. Ana Garza, Kalispell
2. Mary Roth, Polson
3. Brian Smith, Missoula
4. Dave Stenerson, Hamilton
5. Jason Kindsetter, Great Falls
6. Jordon Roberts, Helena
7. Mary Anne Miccio, Butte
8. Mary Brown, Anaconda
9. Mary Kramer, Bozeman
10. Dick Phillips and Robert Drew, Billings
11. Rhonda Hansen, Glendive
12. Gary Bunky, Miles City

Apparently, the OPD has not been receiving monthly reports from Havre or Lewistown because neither area had an attorney in the union bargaining unit. Because Havre now does have an attorney in the bargaining unit, information should be provided from that area.

When reports are received by the central office, the numbers are simply transferred into OPD's report to the Commission. Carlene Green at the Central OPD office keeps the emails that are sent as back-up and to verify, before the report is published, that no errors are made in transferring the numbers to the final report. It is also my understanding that Carlene, after I made some inquiries into this matter, recently sent the regions their portions of the report to verify the accuracy and will do so every month, at least for a while. Based on Carlene's prompt and informative response to my query, I am under the impression that Billings may have been reporting in a fashion that was different from other regions. Until recently, Billings was not reporting units for misdemeanor attorneys. Carlene advises she has now asked them to do so and they have complied.

Carleen's latest communication to me is attached to this letter as Appendix A. I note that Region 9 (Billings) is not reporting elevated CWS numbers and is, in fact, in fifth place as far as overall case loads. I will explain (in a separate letter) to all FTE's and contract lawyers that the CWS is the only way the PDC has to compare apples to apples in determining whether there has been an inequity in committing resources to any given region. As best I can tell from all of this, one of three things is happening: (1) Billings is not being asked to carry an excessive case load in spite of perceptions to the contrary; (2) there is still a flaw in the CWS reporting that should be sorted out on the regional level; or (3) the CWS is not yet sophisticated enough to detect an excessive case load in some instances.

Please provide the PDC with a written response to what I have set forth above. If you feel explanations are in order, if I am in error, or there is more information regarding the case weighting system that would be critical for the Public Defender Commission to know, please include that in your response.

2. Region 9 (Billings) case loads.

In an effort to put the allocation of resources issue to rest regarding the Billings region, please provide the Commission with a break down of how many cases are being assigned to contract lawyers and how many cases are being assigned to FTE's. For purposes of analysis, I would appreciate it if you also provide the same data for the Missoula region. The main concern seems to be that

Billings is not being allocated resources on the same level as Missoula. If this is not the case, we, nevertheless, need to provide the Billings folks with that data and our analysis in order to put this issue to rest so that we can move onto the pressing need of providing quality legal representation to our clients.

3. A perceived delay in services in Libby.

I received a query from Amy Guth in Libby about how the system works there. Amy does not work for our system, but occasionally sits in as a JP. As she expressed concern that on some occasions people were languishing in jail for days, and perhaps a week or more, before they saw an attorney. She indicated that when she asked about the delay, she received a response having to do with a policy of the OPD to allow contract lawyers five days in which to accept or reject an assigned case. I spoke briefly with Larry Murphy about this. He indicated that there was no such policy. This appears to be merely a matter of mis-communication. I would, however, like to respond to Amy and ask her to pass on my response to the full-time lower court judge in Libby.

4. A procedure for providing the PDC with warning re: cases which have or may significantly impact operations or budget.

I wanted to confirm that at our last meeting Jocelyn Hunt, the new Chief Appellate Defender committed to attempt to provide to you and to the PDC as much advance notice as possible if there are issues before the Montana Supreme Court which may have significant operational or fiscal impact on the Public Defender system. Because the most significant issues may arise in the ineffective assistance of a counsel arena, could you please ask Jocelyn to provide the commission with a confirmation that conflict counsel and counsel handling post-conviction relief issues are alerted to the Commission's concern. If an MOU is being used for conflict counsel on an appellate or post-conviction relief basis, would you please advise whether it you think it advisable to insert language into the MOU alerting contract lawyers to the commission's concern about issues which may have a substantial operational or fiscal impact on the Public Defender system.

5. Obtaining advance funds for witness expenses.

In response to my invitation to meet with the FTE's and for their input, several FTE and contract lawyers raised questions about the current policy for funding expenses related to trial and hearing witnesses. Please inform the Commission about how requests for advance payment of travel and per diem are being handled in both the public defender office system and on a contract level.

6. Historical data on PD case percentages.

If possible, please provide the commission with information about the percentage of criminal charges that are being handled inside the public defender system. In particular, I am interested in whether this number has changed in the years that we have been in operation.

7. Accuracy of information reported to the PDC.

Please provide the commission with a proposed policy or standard for assuring that the information being provided to the PDC is accurate. By separate, contemporaneous letter, I have sent a letter to all of our front-line attorneys and staff, beseeching them to diligently enter the information and data required for Just Ware. I can't, in good faith, ask them to make that effort unless we have assurances that the data they input and other operational data generated within the system is being accurately summarized and/or reported to the PDC.

At our last meeting, I brought up the possibility of having all managing attorneys certify compliance with all Commission Standards. In light of the fact that our standards are lengthy and in-depth, you suggested that it would be too difficult to simply obtain a blanket certification at this point. You indicated that you would begin a survey on a regular basis regarding compliance with specific standards. If you have developed an order in which various standards will be addressed, please provide that list to the PDC.

Since PDC's October meeting, the OPD has sent the PDC a report on compliance with standards relating to representation of clients in custody at their initial appearance. As we discussed when the standard was adopted, the distances involved in the more rural areas prohibit universal representation of clients in custody. The OPD report did indicate, however, that as of the date of the report

attorneys were attending initial appearances for all clients in custody in towns in which an office is located and, with the exception of Kalispell, PD's were meeting with clients in the jail prior to their initial appearance. As it turns out, that was incorrect. Please provide an amended report regarding this standard including a summary of the process central OPD used to verify the accuracy of the report.

8. Continued compliance checks.

With respect to compliance with various standards, it is my understanding that you intended to send out a query about every three weeks regarding compliance with a separate standard. Please advise if additional compliance checks have been performed and, if so, what measures have been taken to insure the accuracy of the information reported to OPD and ultimately to the PDC.

9. Job descriptions for managers.

Per Commissioner Tara Veazy's request, please provide us with copies of the job descriptions for all management personnel.

10. Costs Associated with the Special Defender's Unit.

At the October meeting you reported you were on the verge of completing the process of assembling a special defense unit. As I understand it, that unit would be available to assist or take the place of attorneys in rural areas who would find themselves overtaxed by the work associated with a major case. I asked you and Harry to put some numbers together regarding the cost of this undertaking. While I support the concept, I am concerned that the cost may take away from the system's ability to provide basic services in other areas. I may very well be wrong. One concern I have is the sheer cost of moving a defense team hundreds of miles and paying per diem and travel associated with the venture. With that in mind, please provide the PDC with a list of cases now handled by the special defense unit and the locations in which those cases have been filed.

11. OPD's response to the AU report.

Commissioner Veazy would also like to see a draft of any long-term written plan the OPD is developing in response to the American University critique.

12. Mental Health Protocol.

OPD's development of a protocol for engaging the services of mental health professionals was a major cost saving move. Prior to the creation of this system, apparently mental health evaluations and assessments were often conducted needlessly or the evaluation conducted far exceeded the issues at hand. Both the PDC and the OPD have pointed out this cost-saving measure to those who control our funding as an indication of our fiscal responsibility. At the October 15th meeting with FTE's and contract lawyers, however, there was a general agreement among the attendees that the current system is too frugal. Attendees expressed a concern that their clients were paying prices because they could not get the mental health assistance they felt was necessary or because they are simply out-gunned by Prosecutors whose budgets are constrained.

This might be better discussed if and when the FTE's and contract lawyers are able to arrange for ex officio attendance and participation at PDC meetings. However, I thought I should give you a head-up about this because I anticipate it will be an issue raised by FTE and contract lawyer representatives.

If you have any immediate reaction to what I've written, please feel free to respond.

13. Kalispell.

Although we are still in the process of figuring out how the PDC will effectively oversee and evaluate the system's performance, I believe that, for now at least, the solicitation of anonymous input has served its limited purpose. With that in mind, I wanted you to know that I've received a report from a person who insisted on anonymity (someone outside the system) that the services we are providing in Kalispell are worse than what was being provided prior to the creation of the current system. I advised the reporting person that I would give no weight to the report until such time as the person or others qualified to assess our system's performance are willing to come forward and be identified. I was advised that the

reporting party would arrange to have that happen. I've heard nothing more at this time.

I will say that I was disappointed to hear from John Puttika at the PDC's October meeting that he was unaware of Dan Donovan's success in Great Falls in the quest for early contact with potential clients in custody. As I understand it, the issue has now been raised in Kalispell. I've received a summary report from Steve Nardi, who is no longer on the Commission, about what he expects will now occur in Kalispell, but I've seen no court order or agreement. Please provide the PDC with a status report on the Kalispell situation and, if possible, a copy of any court order issued or agreement reached re: early access to potential in-custody clients.

14. March NLADA Conference re: training trainers and PD management.

Commissioner Jim Taylor has forwarded to me and, I believe, you a copy of the agenda for an NLADA training program in Kentucky on March 22-26, 2010. Please advise whether Eric Olson or any other trainer from OPD has an interest. Personally, I'm very interested in the management training end, but would defer if someone from OPD wishes to attend. I'll ask that this matter be placed on the PDC December meeting agenda.

15. Conflicts Issue.

I've been mulling over the conflict of interest issues which have been rejuvenated by the AU study. As I understand it, Jocelyn Hunt, Chief Appellate Defender will provide us with a memorandum why our current policies and structure can be defended. While I have some concern about a *Strickland* IAC claim and the broad-based impact it could have on the system, my major concern is for our front-line attorneys dealing with a complaint to the Office of Disciplinary Counsel. While our current structure may survive an IAC challenge, I'm not sure where that leaves us with the ODC. I'm mulling over an overture to Shawn Thompson re: this issue, but am not sure initiating a dialogue over which we have

little control is the best way to go. Please let me know if you have any thoughts on this.

If we've gotten something beyond an ambiguous judicial ruling on the various motions by prosecutors, such a ruling might be a good tool to use with ODC. I'm afraid I've lost track of the status of the various challenges. Please be good enough to update the PDC on this issue.

16. Just Ware Status.

Thank you for arranging to have Brian Smith give us a demonstration of the Just Ware program at our last meeting. I had initially asked that our meeting in December coincide with that of the Interim Committee on Law and Justice in the hope that they might have time to take a look at where we're at. They are committed to touring a state facility, however, and won't have time for a demonstration. When we met in July, OPD hoped to have the system completely functional by September. I'm not sure I was told the system is completely functional at our October meeting. Are we now able to obtain full input relating to:

1. Type of Case
2. How far the case progressed procedurally;
3. Time devoted to the case; and,
4. Disposition of the case?

17. CLE Evaluation.

Commissioners had asked to see a copy of the current electronic evaluation form for educational programs. Cathy Doyle was since good enough to provide that form to the PDC. In response, I replied as follows:

There was some discussion about how failure to fill out and transmit the form back to central OPD meant the attendee did not receive credit for attending the

program in question. Somehow, I lost track of how that works. Annually, the State Bar sends me, and all other attorneys licensed to practice in the State, a certification form. I am to complete that form indicating all CLE programs I attended in the past year and return the form to the State Bar after signing the form certifying the information is correct. That being the case, I am confused about how an attendee would fail to receive credit for attending a CLE. Does the OPD maintain an in-house system of monitoring annual CLE attendance for FTE and contract lawyers? If attendees don't receive in-house credit unless they complete the form, is there a written policy explaining this? I find nothing on the face of the form that warns about the consequences of failure to comply. If my recall is faulty, how is OPD insuring meaningful evaluation by requiring completion and return of the electronic evaluation form?

I don't recall receiving a reply to my query. If a reply was made, please direct me to where I've misplaced it. If not, please reply.

18. IDENTIFICATION OF ACCOMPLISHMENTS TO DATE.

At the October PDC meeting commissioners suggested the PDC prepare a list of significant accomplishments to date for purposes of reporting to the legislature and seeking continued funding and support. Please prepare a list of the accomplishments OPD wishes identified for this purpose.

Since the PDC met in October, the following events, or lack thereof, are salient:

- 1. Contract Lawyers.** At the October 15th meeting with front-line personnel, I was very pleased to not hear any significant

criticisms expressed on behalf of the contract lawyers. The creation of this system and the position in which Larry Murphy has served has placed Larry in an almost untenable position. For the first time in the history of providing public defense services, the quality of contract work is being evaluated and the costs of that work are being reviewed. Because of the development of the MOU and working out the problems inherent with creating a new contract system, we have lagged behind in evaluating the performance of our contract lawyers.

2. Input form and participation in the process by front-line lawyers, investigators and staff. At the October 15th meeting, after hearing concerns that front-line lawyers, investigators and staff have not been given enough voice in the creation and ongoing operation of the PD system, I asked for suggestions on how to change the situation. In general, I was told the FTE lawyers, the contract lawyers and investigators would like to see their interests represented by ex-officio representatives attending PDC meetings and participating in the decision making process. The representatives for FTE's would be chosen by them from the members of their current executive boards. We discussed the possibility of contract lawyers being represented by an MTACDL representative. Because staff members did not attend the annual conference, I have drafted a separate letter, a copy of which is attached as Appendix C, asking their union representative to arrange for a method of seeking their input about whether they want similar participation, and if so, in what fashion they would propose to bring that about.

I explained to those who attended the October 15th meeting that the PDC members did not have a wealth of management skills and were seeking a way to get input from the front-line workers in the system in order to effectively manage the system and evaluate the performance of the OPD. On December 17, 2009 you and Harry Freebourn have arranged a training session for PDC members on a variety of topics related to our tasks and responsibilities as commission members.

Thank you for doing so and for including in those presentations a discussion on management techniques.

4. Other Management Training. As I mentioned above, additional management training may be available in March through a NLADA program.

5. Seattle conference re: representation at initial appearance and possible funding sources. I dropped the ball on the Seattle seminar that Jim Taylor brought to our attention. I returned from Helena and was unable to locate the pamphlet. I realize that Commissioner Veezy indicated that she would be willing to attend the conference, but I forgot to query Jim about the specifics. I will attempt to create a more reliable tickler system for myself in my role as chairman in order to avoid any similar lapses in the future. I apologize.

6. Preparation for and meeting with the Interim Committee. Harry, once again, has been very instrumental in dealing with Sheri Heffelfiner of the Legislative Counsel to arrange coordination between the Commission's meeting on December 17th and the Interim Committee's meeting of the same date. Chairman Ajoure has given us an hour to make a presentation. I plan to put together a written presentation for the meeting. I will forward it to you and Harry for your review and comments as soon as possible.

7. Attendance of PDC training and December meeting. While there were some initial concerns about the PDC being able to have a quorum at the December meeting, those have gone away. The meeting (as well as the training for commissioners) should be well attended.

8. Grant funds. Congratulations on successfully obtaining \$62,360 from the Montana Board of Crime Control for a records

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management project. As I understand it, the funds are part of the American Recovery Reinvestment Act. In these times of increased case loads well beyond increases in funding, the money was desperately needed.

Thank you for reviewing and responding to this letter. Please arrange to have it posted to the OPD website with some sort of obvious routing that will make it readily acceptable to everyone in the system.

Sincerely yours,

MICHAEL J. SHERWOOD
Public Defender Commission, Chairman

**OFFICE OF THE STATE PUBLIC DEFENDER
CASE WEIGHTING SYSTEM REPORT - INTERNAL AUDIT**

<u>Number</u>	<u>Region Name</u>	<u>Number of Attorneys (FTE)</u>			<u>Region Average as:</u>	
		<u>Reporting</u>	<u>CW Reduced</u>	<u>CW Increased</u>	<u>Reported</u>	<u>Revised</u>
1	Kalispell	16.00	1.00	-	142.58	142.23
2	Missoula	22.00	7.00	3.00	142.49	142.18
3	Great Falls	12.00	1.00	1.00	106.38	102.50
4	Helena	9.50	-	8.00	163.47	171.79
5	Butte	9.00	2.00	2.00	124.03	120.25
6	Havre	1.00	-	-	132.00	132.00
7	Lewistown	1.00	-	-	132.00	132.00
8	Bozeman	11.00	10.00	-	209.62	119.43
9	Billings	17.75	5.00	-	131.73	123.97
10	Glendive	2.00	2.00	-	112.50	97.38
11	Miles City	2.00	-	-	120.00	120.00

Notes: All original and revised information came from the reporting region and was transferred by the central office onto a master worksheet.

The information is for the period September 1, 2008 through August 31, 2009

No information was altered by the central office, however, there were several minor keying errors. If an attorney's information in any month was left blank the central office placed a value of "11" units into that blank space as per the "instructions" provided by the LMC.

Please note that Billings only began reporting on misdemeanor attorneys beginning July 2009 (there are 6 attorneys reporting).